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AUTHOR Gottlieb, Stephen S.
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ABSTRACT

Legal writing is a unique form of composition. The legal style is characterized by a reliance upon nominalizations, archaisms, jargon, and foreign (especially French and Latin) terms and a scarcity of verbs and adverbs. Twelve judicial opinions, all on the subject of whether an advance degree should be considered marital property upon divorce, were examined for the presence of such stylistic features. In addition, the numbers of first-person references (i.e., "I," "me," or "this court") and references to "equity" and the "reasonable person" were evaluated. One of the opinions analyzed was taken from a New Zealand case, two were Canadian, and the rest were from American state courts. Analysis revealed that the language used by American judges suggests the possibility of a greater openness to novel legal arguments than is true of judges in other common law countries. (References to 13 cases and 16 other sources are attached.) (SG)

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The Use of Language in Judicial Opinions

by

Stephen S. Gottlieb, J.D.
August, 1990

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Introduction

What follows is an analysis of the manner in which appellate judges write their opinions. Cases from courts in the United States, Canada and New Zealand are examined. For the sake of uniformity, all of the opinions are taken from cases involving the same legal issue: whether an advance degree is to be considered marital property for the purpose of property division upon divorce. This topic was chosen because it requires the courts to interpret property law, which is more likely than statutory or constitutional law to be approached in a similar manner across jurisdictions whose legal systems evolved from the British common law. The ultimate decision of each court is less important here than the manner in which the court framed its arguments and arrived at its decision; however, facets of the opinions dealing with substantive law have not been ignored.

In evaluating the opinions studied, various aspects have been considered. For instance, some critics have made the point that legal writing is often composed of long and convoluted sentences. Crystal and Davy have suggested that the unusual length of sentences and scarcity of punctuation in legal documents may be a function of history. They pointed out that early legal drafting efforts took the form of documents whose words filled the page from top to bottom and side to side, without significant margins and with little punctuation. Sentences tended to be quite long,

sometimes filling whole pages, to further reduce the need for punctuation. The apparent aim of these techniques was to limit the possibility of fraudulent additions to and deletions from the text. (Crystal and Davy, 1969, p. 197.)

Analysts have also noted the frequency of complex constructions in legal writing. One factor that contributes to the complexity of legal writing is the use of nominalizations. These are words which usually appear in verb or adjective form but which are turned into nouns by the addition of endings. (Charrow and Erhardt, 1986, p. 109; Danet, 1980, p. 477-78.) The words "manifestation" and "appropriation" are examples of nominalizations formed from verbs, while "malleability" and "specificity" are created from adjectives. A related construction is known as the nominal form, which is a series of words including nouns, prepositions and other connectors which together form a long string which comprises the subject of the sentence. As Crystal and Davy have written:

> One of the most striking characteristics of written legal English is that it is so highly nominal, that is, many of the features in any given stretch are operating within nominal group structure, and the long complicated nominals that result are noticeable by contrast with verbal groups, which are relatively few, and selected from a restricted set of possibilities.

(Crystal and Davy, 1969, p. 205.) Crystal and Davy provide an example of a nominal group, taken from a rental contract: "the payment to the Owner of the total amount of any instalments then remaining unpaid of the rent hereinbefore

reserved and agreed to be paid during the term and the future sum of ten shillings" (Id., pp. 196-97.)

Crystal and Davy's point about the scarcity of complex verb constructions in legal writing also bears emphasis. Unlike the wordiness of the noun-based nominal groups, the predicate tends to comprise a very small part of the sentences. While these devices tend to be rare, the verbs which legal writers use often come "from one or other of a fairly small number of lexical sets." (Id., p. 207.) The authors noted the frequency of such verbs as "deem," "accept," "require," "agree," and so on, and the accompanying rarity of most other verbs. (Id.)

One very common (perhaps the most common) criticism of legal writing is that its practitioners rely all too often on archaisms and other legal jargon. "[M]ost people, when asked to imitate or parody the language of lawyers, will probably not get very far before throwing in a 'witnesseth' and a sprinkling of 'aforesaids' and 'hereinbefores.'" (Id.) Furthermore, as Sales has indicated:

> The law, like all professions and scientific disciplines, is steeped in jargon. These terms though sometimes comprehensible to others within the discipline, are often like a foreign language to the uninitiated. When some glimmer of understanding does arise in the layperson-listener, it is likely that the attributed meaning misses the intended meaning.

(Sales, 1977, pp. 44-45.)

While one might criticize the widespread use of jargon in legal writing, it is probably true that readers both

within and without the profession expect to encounter such terms. As Crystal and Davy suggest, the pressure to avoid ambiguity and unintended meaning probably contribute to the tendency among lawyers and judges to rely on the old, proven terms and formulae in writing. (Crystal and Davy, 1969, p. 194.)

Foreign terms, especially French and Latin ones, often find their way into the writing of lawyers and judges. The Norman conquest of England still garners tribute to the French from the Anglo-American legal system, in the form of French words and phrases in legal writing and procedure. "Voir dire" remains the name of the jury selection procedure, and even such commonplace legal terms as "party" and "property" (Danet, 1980, p. 476) owe their allegiance to the legal system of William the Conqueror and his heirs. ("Heirs" itself is another French contribution, according to Webster's Third New International Dictionary, 1971). Interestingly, as Danet explained, early criticism of legal writing did not focus on the medium's complexity as much as on the fact that the language of the law was French. (Danet, 1980, p. 465, quoting Mellinkoff, 1963, p. 111.) Latin also remains a significant influence on legal writing, as indicated by the frequency in legal documents of such terms as "res ipsa loquitur" ("the thing speaks for itself") and "mens rea" ("guilty mind") and such maxims as "expressio

unis est exclusio alterius" ("to say one thing is to exclude the other").

A notable offshoot of the popularity of French and Latin terms in legal composition is referred to as the doublet. This is a pair of synonyms or near-synonyms that appear side by side. Some analysts believe that doublets arose from the practice among British lawyers to use both the Anglo-Saxon and French or Latin terms for a legal principle when writing, as a way of making sure that the document carried the intended meaning and was understood as such. (Danet, 1980, p. 469, citing Mellinkoff, 1963.) Common doublets include "will and testament," "cease and desist" and "rules and regulations."

Commentators often complain that legal writing is simply not communicative. Crystal and Davy summed up the criticism:

> To speak of legal language as communicating meaning is in itself rather misleading. Of all uses of language it is perhaps the least communicative, in that it is designed not so much to enlighten language-users at large as to allow one expert to register information for scrutiny by another.

(Crystal and Davy, 1969, pp. 193-94.)

Another characteristically legal writing device is the "whiz deletion." This is the name given to the exclusion of "which is," "who are," "that is," etc., where such a term would normally introduce a clause. (Charrow and Charrow, 1976, cited in Danet, 1980, p. 478-79.) The sentence, "The

party suing has the burden of proof," is an example of a whiz deletion, as the words "which is" are not found as one would expect after the word "party."

Other factors have been considered in the cases which have been reviewed here. Some of these are: the citation of precedent; the peculiarly legalistic usage of "such" and "said" before nouns ("said party," "such time"); the infrequency of adverbs; the over-identification of parties (i.e., "Defendant-Appellant Jones"); reliance upon recurring legal metaphors (for example, "The Constitution is not a panacea for every blot upon the public welfare...," (Reynolds v. Sims, 337 U.S. 533 (1964)); references to the "reasonable man," "reasonably prudent person," and so on; and appeals to equity. The use of such references as "we," "our" and "this court" has also been evaluated, as has the occurrence of footnotes. Concurring and dissenting opinions have not been ignored.

In the analysis of cases that follows, an attempt has been made to emulate the spirit of Murphy and Rawlings' review of speeches by members of the appellate committee of Britain's House of Lords (Murphy, W.T. and R.W. Rawlings, 1981). Murphy and Rawlings prefaced their findings with the statement:

> [W]e deal primarily with the surface level of the text...Thus we do not use biographical information on the judges nor seek to "locate" the judgments alongside the extra-judicial writings of the dramatis personae. We take no account of the group interaction which may have preceded the publication of the final text, nor do

> we consider what ideological or political functions the text might perform. We focus in short upon the "legal product" viewed in isolation from the circumstances of its production; in so doing we exclude discussion of the merits of the decisions or the motives which underlie them, although we sometimes consider the adequacy of the arguments deployed.

Id. at 618 (footnotes omitted.)

The American cases studied were chosen more or less at random; many more were available, but the number of U.S. opinions used was purposely restricted to avoid devoting too much attention to these at the expense of cases from other countries. However, an attempt was made to gather cases from different American states. As for the other nations' opinions, all that were found were used. No British or Australian cases were uncovered that were precisely on point.

A combination of statistical and impressionistic approaches was taken in this research. The frequency of use of some of the characteristics noted above was actually counted, but the entire opinions were also read and studied for overall structure and tone. To compare the occurrence of certain features in each case accurately (i.e., the number of case and statute citations, adverbs, appeals to equity, etc.), these elements were only counted if they appeared within a selected ten-paragraph sample of an opinion. In that way, a given opinion would not be said to contain greater numbers of statutory citations, for example, simply because the opinion was unusually long. Because some

opinions began with long discussions of factual and procedural history, paragraphs composed entirely of such details were not included in the ten-paragraph analysis (unless the brevity of an opinion made it necessary). Language which a court quoted directly from other cases, from the trial court or from other authorities was also not considered a part of the opinion in analyzing the incidence of particular stylistic features. Moreover, paragraphs which consisted entirely or substantially of quoted material were also excluded from stylistic evaluation. In isolating the ten-paragraph sample, the selection process began with the first paragraph of the opinion and proceeded one by one through successive paragraphs. Paragraphs were either included or excluded according to the criteria described above until a ten-paragraph sample was obtained.

I. The American Cases

Judging from the numbers of cases uncovered in the jurisdictions researched (the U.S., Canada, New Zealand, the U.K. and Australia), the issue of advance degrees as marital property has been brought to the U.S. courts more frequently than in any other common law country. This fact is a function the greater volume of cases of all types which are brought in American courts, but may also reflect the U.S. courts' greater receptivity to such an unusual claim on marital property. As the American courts have considered

the issue more often, one might anticipate that in dealing with the matter, patterns have emerged. The question of whether this has actually occurred will be addressed later.

If its citation by other courts is any indication, Colorado's In re the Marriage of Graham, 574 P.2d 75 (Colo. 1978) has been one of the most influential opinions on the advance degree-marital property issue. In beginning his opinion for the Colorado Supreme Court, Justice Lee noted that the court was facing a "novel question." Perhaps Mrs. Graham's claim on her husband's advance degree was too novel; the court refused to accept her argument. Taking a semantic approach, the court interpreted the state legislature's definition of "property," and determined that the definition did not encompass a spouse's education or advance degree. Therefore, the court concluded, Mrs. Graham could not have a property interest in that which was not property.

As a whole, the Graham opinion was relatively free of the convoluted reasoning and writing styles which often characterize judicial opinions. Searching the majority opinion, there is little to criticize in the organization or clarity of the language. Justice Lee used the terms "we," "this court" and "our" once each, employed six adverbs, cited statute and case law five times each, and mentioned other authorities on two occasions. The opinion referred twice to equity, and twice mentioned the legislature. What

might be called "borderline nominalizations" were found in the court's use of the words "acquisition" and "expenditure," both of which are fairly common in legal writing and familiar to the casual reader. The only incidence of an over-identification of a party was Lee's reference to "Ann P. Graham, wife and petitioner here." Id., at 431. This appeared early in the opinion, and helped clarify who brought the appeal. Even Justice Lee's most complex sentence was not very difficult to comprehend: "The Uniform Dissolution of Marriage Act requires that a court shall divide marital property, without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors." Most of the sentences in Lee's opinion were even more straightforward.

Justice Carrigan's dissent in Graham contained much more legalistic language than did the majority opinion. Carrigan used such expressions as "an asset whose wrongful deprivation is compensable" and "render the courts impotent to provide a remedy." Carrigan's choice of adverbs was legalistic as well, as he "respectfully" dissented, asserted that the law "[u]nquestionably" supported his view, and expected one who "tortiously" harmed another to pay damages. None of Carrigan's sentences was particularly long, but the tone was consistently one of legal formality: "In cases such as this, equity demands that courts seek extraordinary remedies to prevent extraordinary injustice." In ten

paragraphs, the dissenting justice cited as many as 13 cases and one statute. He also used the word "I" twice and appealed to equity once. The dissenting opinion contained no footnotes.

Another opinion which has been widely cited from state to state is Kentucky's Inman v. Inman, 578 N.E.2d 266 (Ky. Ct. App. 1979). See also, Mazanec, K.M., 1982, p. 18. Inman involved the dissolution of a marriage and a wife's claim to a share of her husband's dental degree as marital property, after she had put him through dental school. The court cited the Graham majority in concluding that an advance degree was not marital property.

Judge Hayes' Inman opinion was somewhat wordier and more legalistic in style than was the majority opinion in the Graham case. For example, Hayes employed such terms as "nonlicenseholder" and "partitionable," and made three appeals to equity within a ten-paragraph portion of the opinion. In addition, the judge used two common legal terms of non-English origin: indicia and en banc.

The great length and complexity of some of the sentences within the Inman opinion are also unusual. For instance, Judge Hayes wrote: "Proper guidelines for determining whether a marital property classification is proper in a particular instance might include whether there is more tangible property whose division would work equity, and the extent to which there was reciprocal aid." Id., at

269. The repetition of the words "proper" and "property" within the passage produced a nearly incomprehensible sentence. The following sentence is another example of the Inman opinion's style: "Further, once a dollar value is placed on official permission to practice a profession, a court is still faced with the very difficult job of deciding the portion of the capability which is owing to the other spouse's efforts." Id., at 268. The use of the word "capability" in the latter quoted sentence is confusing at best, and it is not clear whether Judge Hayes is using the phrase "owing to" as a synonym for "because" or is implying that Dr. Inman is in some way indebted to his wife.

The Inman opinion is also notable for its use of adverbs. In general, as noted previously, adverbs tend to be scarce in legal writing. However, Judge Hayes used nine adverbs in just ten paragraphs. Most of these were common words, such as "greatly" and "deeply," but the judge also employed the legalistic "tortiously" and the word "flatly," which seems to crop up frequently in legal composition.

There is little citation to authority in the ten-paragraph sample of the Inman opinion. Judge Hayes only cited three cases, and made reference to statute only once.

Several aspects of the dissenting opinion in Inman bear analysis. In his four-paragraph dissent, Judge Wilhoit employed four common adverbs, mentioned equity five times, made three references to statute, and cited one case. The

judge also appealed for legislative action. The tone of the dissent was much more personal, with the first and last paragraphs began with the word "I," and the third sentence including the words "it seems to me." Id., at 271. Still, Judge Wilhoit's writing was not without its wordiness, as the entirety of that third sentence demonstrates: "Nevertheless, in this particular case it seems to me that an equitable result can better be reached through an award of maintenance rather than by resort to the tenuous proposition that a license to practice a profession is marital property." Id. In his use of the words, "in this particular case it seems to me," Wilhoit appeared indefinite about his commitment to his position. However, further into the sentence he wrote that a view other than his own was a "tenuous position."

Iowa's Supreme Court, in In re the Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978), agreed with the Graham court's refusal to recognize an advance degree as marital property. However, the Horstmann court, like the Graham dissent, emphasized that the degree made increased future earnings more likely. The Horstmann court therefore believed that a wife's contribution to her husband's professional education should be considered when a court decided how much of the husband's future income should go to the wife. Id., at 891.

In stating the Horstmann court's conclusions, Justice Mason made reference to five cases and cited statute once in a ten-paragraph sample of his opinion. The justice alluded to equity six times. The word "we" appeared three times in the sample, and "us" and "this court" once each. Mason used two simple adverbs, "equally" and "apparently." While these elements of the opinion might have been expected to contribute to a conversational tone, Justice Mason's writing style put any such expectation to rest, as the following sample illustrates:

> However, the Colorado Supreme Court pointed out that when maintenance is sought in a dissolution of marriage proceeding and a need is demonstrated the contribution of the spouse seeking maintenance to the education of the other spouse from whom maintenance is sought is a relevant factor to be considered in fixing the amount of such maintenance.

Id.

There are no footnotes in the opinion, and no concurring or dissenting opinions.

Upon discovering that a ten-paragraph sample of an opinion contained 21 familiar adverbs and employed the word "we" eleven times (and "us" and "our" once each), one might anticipate that such an opinion would be highly readable, personal and expressive. However, that was not the result in New Jersey's Stern v. Stern, 331 A.2d 257 (N.J. 1975). The opinion is full of long, complex sentences, of which the following is the most extreme example within a ten-paragraph section of the opinion:

> Generally speaking the monetary worth of this type of professional partnership will consist of the total value of the partners' capital accounts, accounts receivable, the value of the work in progress, any appreciation in the in the true worth of the tangible personalty over and above book value, together with good will, should there in fact be any; the total so arrived at to be diminished by the amount of accounts payable as well as any other liabilities not reflected on the partnership books.

Id., at 261 (footnotes omitted). A single nominal group accounts for much of this long and complicated statement.

In the ten-paragraph segment, the Stern opinion went on to mention equity five times (including four times in the form of the phrase "equitable distribution"). Justice Mountain's majority opinion also cited case law and statute three times apiece, and noted seven other authorities. There were five footnotes in the sample, and seven in the case overall.

New Jersey's Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (N.J. 1982) (cited in Tetreault, S., 1983) is interesting partly because in the case, the state's Supreme Court devised a new approach to the degree-as-property issue. Writing for a unanimous court, Justice Pashman elaborated upon what the court termed "reimbursement alimony." The goal was to repay a spouse for all of his or her contributions toward the other spouse's professional training.

The Mahoney opinion made much of the idea of "equitable distribution," citing the principle nine times in ten

paragraphs. Under New Jersey law, property obtained during a marriage was to be fairly divided upon divorce. However, as already noted, the court refused to view a degree as property. In a ten-paragraph sample, the court cited twelve cases in support of its views, referred to statute five times, and made four appeals to legislative history. Adverbs were scarce in the opinion, appearing only twice. Some of Justice Pashman's sentences were rather complex, such as: "Therefore, statutory construction in this case means little more than an inquiry into the extent to which professional degrees and licenses share the qualities of other things that the Legislature and courts have treated as property." Id., at 531.

The New York Court of Appeals relied heavily upon statutory citation in the case of O'Brien v. O'Brien 66 N.Y.2d 575 (N.Y. 1985), (cited in Marcotte, M., 1986). In that case, there were 20 citations to statute in ten paragraphs, while there were twelve references to equitable distribution or the state's Equitable Distribution Act. There were only five case citations, nine references to the legislature or legislative history or intent and two references to other authorities. Justice Simons employed eleven mostly common adverbs in the ten-paragraph sample of his opinion for the seven-member majority (two other justices separately concurred). The justice's writing style is reflected in the sentence:

> There is no reason in law or logic to restrict the plain language of the statute to existing practices, however, for it is of little consequence in making an award of marital property, except for the purpose of evaluation, whether the professional spouse has already established a practice or whether he or she has yet to do so.

Id., at 586.

Also in O'Brien, Justice Meyer supplied a four-paragraph concurrence which contained one reference to himself ("I"), four adverbs, one case citation, three statutory references and two mentions of "equitable distribution." The following is an example of Justice Meyer's style of expression:

> Yet a professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary objections imposed by the distributive award made on the basis of the trial judge's conclusion (prophecy may be a better word) as to what the career choice will be leaves him or her no alternative.

Id., at 591. While verbs tend to scarce in most legal writing (Crystal and Davy, 1969, p. 207), the sheer number of such words in the above quoted sentence contributes to the statement's complexity. "Is" and "be" together appeared five times, "made" showed up twice, and "committed," "locked into," "imposed" and "leaves" all put in appearances. The needless parenthetical statement "prophecy may be a better word" only added to the confusion.

Justice Titone's O'Brien concurrence consisted of just one sentence: "I join in the majority opinion by Judge

Simons for the court, and, like Justice Jackson, forthrightly surrender my contrary views in Conner v. Conner to a more cogent position". Id., at 592 (citations omitted). Titone's style was much more personal than either Simons' or Meyer's, as he used the words "I" and "my" in his brief statement. He also cited two cases and employed the adverb "forthrightly."

Indiana's First District Court of Appeals produced a relatively simple, straightforward opinion in the case of Wilcox v. Wilcox, 173 Ind. App. 661 (Ind. App. 1 Dist. 1977). Few of the sentences in the opinion were very long, and Judge Lybrook employed few unusual adverbs or nominalizations in writing for the unanimous court. He used the word "we" six times, giving the opinion a somewhat personal tone. In all, Judge Lybrook used three adverbs, cited five cases and referred to statutes five times. Only two footnotes appeared in the entire opinion, and there was only one mention of the legislature.

There were a few elements present in the Wilcox opinion that tended to increase its formality: the nominalization "incapacitation" appeared twice, and Lybrook used the legalisms "ambit" and "contra." The only truly long sentence was one in which the judge summarized the court's findings in four clearly numbered points. More typical were sentences which, while written in a formal, legal tone, were brief and easy to understand:

> With that status in mind we must interpret the language contained in the Dissolution of Marriage Act.

Id., at 664.

> As a cross allegation of error, Gerald contends that the trial court abused its discretion by awarding substantially all the marital assets to Gloria.

Id., at 666.

In Moss v. Moss, 264 N.W.2d 97 (Mich. 1978), Michigan's Court of Appeals produced an unusually short opinion on the degree-as-property issue. As there were only eight paragraphs in the entire opinion, all of them were examined for purposes of this study. As was true of Wilcox, the Moss opinion was a fairly uncomplicated one. There were only two references to other cases and three statutory citations. Two common adverbs ("approximately" and "presently") were used, and there were two appeals to equity and an equal number of footnotes. Despite its brevity, the word "we" appeared five times in the opinion, including three times in a single sentence.

For all of its simplicity, the Moss opinion was not free of legalisms. The court used such terms as "deemed" and "in lieu of" in its per curiam opinion. A mixed metaphor appeared in the very first sentence: "[A] wife...finds herself left by the roadside before the fruits of that education can be harvested." Id. The court's use of a double negative in the phrase "the not uncommon situation" elsewhere in that sentence also detracted from

the statement's intelligibility.

An older case, Tremayne v. Tremayne, 211 P.2d 452 (Utah 1949), is interesting for purposes of the present research because it serves as a point of comparison for the later cases which have been examined. Although not addressing the specific degree-as-property issue, Tremayne involved the equivalent issue of whether a wife who supported a husband while he obtained a college degree could claim a share of the increased earning capacity that resulted from that degree.

Because Tremayne was a short opinion, containing only nine paragraphs, it was analyzed in its entirety. Unlike the other cases which have been studied, Tremayne was full of adverbs, containing nine (for an average of one per paragraph). There were four statutory and four case citations (all of the cases appeared in a single string citation), but no footnotes. Writing for the court, Justice Wade mentioned equity four times. Though the word "we" was used twice in the opinion, the overall tone was formal and impersonal.

One sentence from the Tremayne opinion bears note, both because it set forth the court's theory of the case and because it was unusually long and tangled:

> She contends that since through the period of their married life both of them have saved their money to make an education possible with the hope of increasing his earning capacity, which as long as they remained married to each other both would enjoy the benefits thereof, and since the court has found that the divorce

> has resulted from his wrongful actions and she has thereby been deprived of participating in the enjoyment of his increased earnings, she is therefore entitled to all the property and in addition to receive from him the sum of $475.00.

Id., at 453-54. Of course, the better approach here would have been to break the passage down into shorter sentences or to at least set phrases apart by numbering specific points.

In the course of reading the American cases, the recurrence of certain nominalizations became apparent. Throughout the cases, such words as "reimbursement" and particularly "acquisition" were used repeatedly, and not always in the same context. Admittedly, these are not uncommon words. However, the reappearance of such words may reflect a conscious or unconscious tendency among judges to use similar language as a means of making opinions appear more consistent with precedent and traditional legal thinking.

II. Other Jurisdictions

As previously noted, American state courts have led the way in the development of the law on the issue of whether an advance degree should be considered marital property. Research of other jurisdictions has turned up very few cases on the subject.

Two Canadian cases which were uncovered involved the question of whether a wife who supported her husband as he

went through professional school should share in the income from his professional practice. It appears that the degree-as-property issue itself has not been addressed yet by Canada's appellate courts.

In British Columbia's Robertshaw v. Robertshaw, 2 W.W.R. 215 (B.C.S.C. 1979), a wife sought a divorce from her physician husband. In conjunction with her divorce action, the wife claimed a portion of the undistributed profits from a holding company which owned the proceeds of her husband's medical practice. Mrs. Robertshaw had worked for the firm, which her husband dissolved when the couple separated. In the case, Justice Fawcus ultimately concluded that property owned by Dr. Robertshaw by means of his medical practice could be treated as a family asset subject to division upon divorce.

In evaluating the elements of the Robertshaw opinion, some differences between the Canadian and American opinions should be noted. The two Canadian cases cited here were each heard by a single justice on the Trial Division of the British Columbia Supreme Court. That accounts for the appearance of the word "I" 18 times in a ten-paragraph sample of the Robertshaw opinion. Fawcus also used the word "my" twice, and once used the word "me." Only once did the justice refer to "this Court," a fairly common phrase in American appellate opinions.

Interestingly, the Robertshaw opinion mentioned no other cases and included no footnotes, but cited statutes 16 times in ten paragraphs. This fact underscores Fawcus' belief that the income-as-property question had already been settled by statute by the time he wrote his opinion. The sample included three adverbs.

In general, an almost conversational tone prevailed throughout Robertshaw. Sentences tended to be short, and there were no foreign terms or legalisms noted. The tone of the opinion is reflected in the following sentences:

> The respondent is a medical practitioner.
>
> This was not done.

Id., at 218.

Re Ladner and Ladner, 116 D.L.R.(3d) 66 (B.C.S.C. 1980), like Robertshaw, was heard by a single justice on the trial level of British Columbia's Supreme Court. In a ten-paragraph section of Ladner, Justice Locke cited five cases, quoting from some of those at length. He also referred to statute six times. Locke used the word "I" five times, "me" once, and "the Court" once. Unlike Fawcus in Robertshaw, Justice Locke used several Latin and English legalisms, such as stare decisis, locus classicus, ratio (italicized, and used as a synonym for "reasoning") and "comity." Locke used three common adverbs, and no footnotes. Few of his sentences were unusually long, but his use of several

clauses within single sentences sometimes produced confusing results, as in:

> A careful reading of the Robertshaw decision indicates that the ratio of that case is that a partnership (a medical partnership) is capable of being a "venture" within the meaning of the Family Relations Act and was thus eligible to qualify as an asset which would permit evidence to be led as to the wife's contribution, if any.

Id., at 69.

While Robertshaw dealt with a medical practice, Ladner involved a wife's claim to a share of her estranged husband's law practice. Nonetheless, Justice Locke concluded that the underlying reasoning in Robertshaw was sound, and decided that nothing barred Mrs. Ladner from claiming a share of income from her husband's legal business.

New Zealand's Godfrey v. Godfrey, Mat. Prop. C 64 (1980) was studied only to the extent that the case was cited in law review articles. The case was quoted in two articles by Rupert Glanville Glover, a barrister and lecturer at New Zealand's University of Canterbury. (See New Zealand L.J. 180 (June 1983) and New Zealand L.J. 360 (Nov. 1984).) The quotations, although brief, offer insight into the tone and language of the opinion. The following sentence provides one example:

> Mr. Willy attempted to rationalise the application on the basis that Mrs. Godfrey's contributions to their marriage during their student days resulted in her husband's acquisition of professional qualifications which could be described as "property," giving him the entrée into the substantial assets that he has now

> acquired as a result of putting those qualifications to use.

N.Z.L.J., June 1983, at 183. One may be struck by the frequency of nominalizations ("application," "contributions," "acquisition" and "qualifications"), and by the presence of both "acquisition" and "acquired" within the quoted sentence. The overall effect was a wordy, confusing statement.

The portions of the opinion quoted by Glover also made frequent reference to New Zealand's Matrimonial Property Act. There were five statutory references in the few sentences which Glover cited. In N.Z.L.J., Nov. 1984 at 361, Glover quoted Justice Casey's Godfrey opinion as stating that "Section 14 [of the Act] deals with 'extraordinary circumstances, that, in the opinion of the Court, render repugnant to justice' equal sharing of property." The phrase 'render repugnant to justice' appears frequently in court opinions.

As Glover wrote, Justice Casey ultimately concluded that in most cases an advance degree would not be considered marital property. N.Z.L.J., June 1983, at 183. Glover went further, comparing the Godfrey result to other jurisdictions' approaches. He believed that U.S. courts were likely to be more open to the degree-as-property claim, as an outgrowth of the legal concept of unjust enrichment: "[W]e can probably safely say that American Courts

have...been willing to disregard the traditional boundaries of the concept of property, in favour of broader equitable considerations." Id.

Conclusion

Glover's comment in the preceding paragraph suggests that American judges may be more receptive to somewhat non-traditional claims on property upon divorce that judges in other jurisdictions would be. If true, U.S. judges as a group may also be more likely than jurists in other jurisdictions to sacrifice reliance on common law property concepts in the interest of fairness to the parties involved in a specific dispute. This in turn might signal a step toward departure from the legalisms and archaisms that frequently populate judicial opinions.

The cases analyzed in this study do not clearly answer the question of whether judges are likely as a group to surrender formalism in the interest of "doing equity" in the context of property division upon divorce. Some courts have willingly abandoned formalistic approaches to the question of what is or is not property. At the same time, however, other judges have continued to apply a more semantically based analysis of the issues with which they are confronted.

Whether the difference between the two forms of analysis noted above (formalism versus equity) is a matter of jurisdictional practice, personal preference among judges

or a combination of these is a question for further study. In the present research, no precise cross-jurisdictional distinctions became clear on this point. To test the theory more fully, it could be helpful to select a more commonly disputed legal issue, and to compare judicial approaches to that issue within a given jurisdiction both among different judges and over time. Further stylistic comparisons could then be made among jurisdictions.

As for conclusions about the use of particular stylistic features in opinion writing, the use of such features does seem for the most part to be a matter of personal preference. One judge may tend to cite many cases, while another may use an unusually large number of adverbs. In the cases studied, it did appear that dissenting judges tended to use words such as "I" and "my" more often than did judges writing for majorities, intentionally or unintentionally underscoring the dissenters' disagreement with and separation from the majority view. Furthermore, no one should be surprised to discover that in regard to an issue which a jurisdiction's legislature had already addressed, a judge would frequently cite statute in composing his or her opinion.

Some general conclusions do emerge from the analysis of the opinions cited above. There is a certain similarity of both tone and style underlying many of the opinions. The judges' writings appear to reflect a shared belief in the

value of precedent and in tradition more generally. For the most part, the judges seemed to accept the motion that to be credible, an opinion should have roots in the past. This was underscored not only in the frequent citation to case law, statute and other authorities, but also in the use of language more generally. As suggested in the analysis of specific cases, certain terms recurred, and a similar legalistic tone prevailed. Particular stylistic devices, such as specific nominalizations, were common to several of the opinions, while such devices as adverbs were scarce in most of the writings. Some of the same metaphors reappeared in various cases, even those from differing jurisdictions.

The recurrence of usages and metaphors in judicial opinions across jurisdictions may reflect a "chain novel" aspect of these opinions. (Jackson, 1988, p. 235, citing Ronald Dworkin's Law's Empire, 1986.) This theory suggests that each judge writing a new opinion on a particular topic feels constrained in some sense by the opinions of those who have preceded him or her. The analogy is to a person finishing a story that another has begun. In Dworkin's view, each writer who expresses himself on a given subject narrows the scope of analysis for succeeding writers addressing the same issue.

A comparison of the formal, somewhat wordy, legalistic style of appellate opinions and the broader category of spoken and written English brings to mind what Charles

Ferguson has termed "diglossia." (Ferguson, 1964, pp. 429-439.) He noted the remarkable differences between the commonplace form of most languages and the much more sophisticated, formal version of languages that sometimes develop for use in special contexts. Ferguson's definition of this "higher" form of language is a very apt description of legal English:

> [A] very divergent, highly codified (often grammatically more complex) superimposed variety, the whole of a large and respected body of written literature, either of an earlier period or in another speech community, which is learned largely by formal education and is used for most written and formal spoken purposes but is not used by any sector of the community for ordinary conversation.

Id., at 435.

Martin Joos grouped language styles into categories, which he called "the five clocks." (Joos, 1961.) His five groups of expression included frozen, formal, consultative, casual and intimate. His definition of the formal style would appear to encompass judicial opinions, in that while the formal style's role is to inform, the receiver of the message "is not to make insertions but must wait until authorized to speak, and is being given time to plan reactions--as much as half a century." (Id., pp. 35-36.) Furthermore, as Joos explained, the formal style is marked by an absence of participation, avoiding the use of such words as "I," "me" and "mine" wherever possible. As Joos put it, "Form becomes the dominant character." (Id. at 36.)

Joos' descriptions seem to have been developed with legal writing in mind. As the analyzed cases demonstrate, the form of legal writing tends to prevail over personality (though to a lesser extent in dissenting opinions), and the tone is one of imparting information. The legal principles being discussed take on lives of their own and evolve slowly over time, while the judges hide themselves behind the written word.

In short, the writing style of judicial opinions is often wordy, highly complex and impersonal. At the same time, the judicial style is grounded in tradition and in a formality unlike that of other disciplines. The underlying goal of opinion writing appears to be to communicate in a manner that is both authoritative and suggestive of consistency with prior authority. In avoiding personalizing influences and simple language and in relying upon time-tested legal formulae, judges are attempting to attain the goals of authority of tone and apparent consistency with precedent.

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